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 11 BURBANK POLICE DEPARTMENT,
 12 BURBANK POLICE OFFICERS ADAM
 13 BAUMGARTEN AND MICHAEL EDWARDS

11 **UNITED STATES DISTRICT COURT**
 12 **CENTRAL DISTRICT OF CALIFORNIA**

14 PRESTON SMITH, an individual;

15 Plaintiff,

16 v.

18 CITY OF BURBANK, et al.

19 Defendant.

) Case No. CV10-8840 VBF (AGR_x)
)
) **NOTICE OF MOTION AND**
) **MOTION FOR SUMMARY**
) **JUDGMENT, OR IN THE**
) **ALTERNATIVE, SUMMARY**
) **ADJUDICATION OF ISSUES BY**
) **THE CITY OF BURBANK,**
) **BURBANK POLICE DEPARTMENT,**
) **OFFICER ADAM BAUMGARTEN,**
) **AND OFFICER MICHAEL**
) **EDWARDS; MEMORANDUM OF**
) **POINTS AND AUTHORITIES;**
) **DECLARATION OF CAROL ANN**
) **HUMISTON; EXHIBITS; REQUEST**
) **FOR JUDICIAL NOTICE;**
) **SEPARATE STATEMENT OF**
) **UNCONTROVERTED FACTS AND**
) **CONCLUSIONS OF LAW;**
) **PROPOSED ORDER**
)
) **DATE: MAY 16, 2011**
) **TIME: 1:30 P.M.**
) **CTRM: 9**
)

1 TO THE CLERK OF THE COURT, ALL INTERESTED PARTIES AND
2 THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on May 16, 2011, at 1:30 p.m., or as soon as
4 thereafter as counsel may be heard, in Courtroom 9 of the above-referenced Court,
5 Defendants City of Burbank, Burbank Police Department, and Burbank Police
6 Officers Adam Baumgarten and Michael Edwards, will and do hereby move this
7 Court, pursuant to Federal Rules of Civil Procedure, Rule 56, for an order granting
8 summary judgment, or in the alternative, summary adjudication of issues, as to all
9 claims for relief on the basis that there is insufficient evidence to create a triable
10 issue of material fact. In particular, the Defendants' Motion is made on the
11 following grounds:

12 1. Plaintiff's Section 1983 claim against Officer Baumgarten, and
13 therefore, also the City of Burbank and Burbank Police Department, is barred
14 because Plaintiff plead guilty to violating California Penal Code § 148(a)(1) and a
15 judgment in Plaintiff's favor would necessarily invalidate his conviction. *Heck v.*
16 *Humphrey*, 512 U.S. 477, 144 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

17 2. Plaintiff's Section 1983 claim against Officer Edwards, and therefore,
18 also the City of Burbank and Burbank Police Department, is barred because
19 Plaintiff plead guilty to violating California Penal Code § 148(a)(1) and a
20 judgment in Plaintiff's favor would necessarily invalidate his conviction. *Heck v.*
21 *Humphrey*, 512 U.S. 477, 144 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

22 3. Plaintiff's state law claims against Officers Baumgarten and Edwards,
23 the City of Burbank, and the Burbank Police Department, are barred because of his
24 conviction for violating California Penal Code § 148(a)(1). *Yount v. City of*
25 *Sacramento*, 43 Cal.4th 885, 902 (2008).

26 This Motion will be based upon this Notice of Motion and Motion, the
27 Memorandum of Points and Authorities filed and served herewith, the Separate
28 Statement of Uncontroverted Facts and Conclusions of Law, filed and served
concurrently herewith, the Declaration of Carol Ann Humiston, the and Exhibits

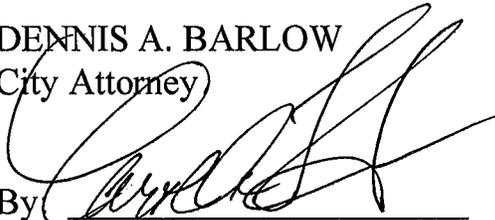
1 thereto filed and served concurrently herewith, the pleadings, documents and
2 records on file herein, and upon such other further oral or documentary matters as
3 may be presented at the hearing of this motion.

4 This Motion is made following a meet and confer letter dated January 26,
5 2011, and the conference of counsel pursuant to Local Rule 7-3.

6 DATED: April 18, 2011

7 Respectfully submitted,

8 DENNIS A. BARLOW
9 City Attorney

10 By 

11 CAROL A. HUMISTON
12 Sr. Assistant City Attorney
13 Attorney for Defendants CITY OF
14 BURBANK BURBANK POLICE
15 DEPARTMENT, BURBANK
16 POLICE OFFICERS ADAM
17 BAUMGARTEN AND MICHAEL
18 EDWARDS
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This case relates to the April 10, 2009, arrest of Plaintiff Preston Smith. Following his arrest, Plaintiff pled guilty to violations of California Health and Safety Code § 11550(a), the willful an unlawful use of cocaine, and California Penal Code § 148(a)(1), willfully and unlawfully resisting, delaying or obstructing a police officer, to wit:

“Ran from Officer Gunn during lawful detention and despite orders to stop; used elbows and hands in a fist to strike Officer Buamgarten, Officer Edwards, Officer Joel, Officer Rodriguez and Officer Gunn during officers attempt to lawfully restrain the defendant; flailed arms and kicked legs when officer Baumgarten, Officer Edwards, Officer Joel, Officer Rodriguez and Officer Gunn tried to detain the defendant.” (Ex. 1.)

Plaintiff’s Complaint alleges that on April 10, 2009, he was being questioned by a police officer. (Comp., ¶ 16.) Thereafter, Officer Gunn tasered him six times. (Comp., ¶ 17.) Conceding that neither Officer Baumgarten or Officer Edwards were at the scene during this portion of the contact between Officer Gunn and plaintiff, plaintiff alleges that Officers Baumgarten and Edwards arrived on the scene thereafter and used force to restrain him. (Comp., ¶ 18.)

Wherein plaintiff’s claim is premised on his claim that Officers’ Baumgarten and Edwards used excessive force in restraining plaintiff in order to affect his arrest, plaintiff’s Complaint is barred as a matter of law by the doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477, 144 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), because any finding in favor of Plaintiff would necessarily invalidate the Plaintiff’s criminal conviction.

As discussed in detail below, Plaintiff was arrested for, charged with, and plead guilty to striking Officers Baumgarten and Edwards for assaulting and battering them while attempting to restrain plaintiff to affect his arrest. Because the criminal record is so comprehensive as to show that all of the events are subject

1 to Plaintiff's criminal conviction, all of Plaintiff's claims are barred.

2 Officers Baumgarten and Edwards move for summary judgment as to all
3 claims. This Motion is based upon the limited issue of whether Plaintiff's claims
4 are barred by his conviction for violating California Penal Code § 148(a)(1).

5 **II. STATEMENT OF FACTS.**

6 On April 10, 2009, Plaintiff was arrested for a violation of Health and Safety
7 Code § 11550(a). (UF 1; Exhibit 1.) During the course of affecting that arrest,
8 plaintiff fled from Officer Gunn. (UF 2; Exhibit 1.) According to plaintiff, Officer
9 Gunn used a taser on plaintiff six times. (UF 3; Comp., ¶17-18.) After plaintiff
10 was tasered, plaintiff could hear officers shouting to Officer Gunn, "Why can't we
11 here you on your radio?" (UF 4; Comp.; ¶ 18.) At that point, plaintiff started
12 yelling, "He's killing me. He's killing me." (UF 5; Comp., ¶ 18.) According to
13 the complaint, Officer Baumgarten "upon arriving at the scene" shouted at plaintiff
14 to, "turn on your stomach and shut the fuck up." (UF 6; Comp., ¶ 18.) Then
15 according the plaintiff, Officers Baumgarten and Edwards used force to ultimately
16 affect plaintiff's arrest. (UF 7, Comp., ¶ 18.) There is no allegation of excessive
17 force used following Plaintiff's arrest. (UF 8.)

18 On April 14, 2009, a four-count misdemeanor complaint was filed against
19 Plaintiff in the Los Angeles Superior Court. (UF 9; Exhibit 1.) Count III of the
20 misdemeanor complaint alleged that plaintiff "did willfully and unlawfully use, or
21 be under the influence of a controlled substance, to wit: Cocaine—a violation of
22 California Health & Safety code § 11550(a). (UF 10; Exhbit 1.) Count II of the
23 complaint alleged that Plaintiff "did willfully and unlawfully resist, delay or
24 obstruct a public officer discharging or attempting to discharge any duty of his
25 office or employment" – a violation of California Penal Code § 148(a)(1). (UF 11;
26 Exhibit 1.) The criminal complaint specifically alleged that Plaintiff committed
27 the following acts of resistance:

- Plaintiff ran from Officer Gunn during a lawful detention and despite orders to stop. (UF 12; Exhibit 1.)

- 1 • Plaintiff used elbows and hands in a fist to strike Officer Baumgarten,
2 Officer Edwards, Officer Joel, Officer Rodriguez, and Officer Gunn
3 during the officers' attempt to lawfully restrain Plaintiff. (UF 13; Exhibit
4 1.)
- 5 • Plaintiff flailed arms and kicked legs when Officer Baumgarten, Officer
6 Edwards, Officer Joel, Officer Rodriguez, and Officer Gunn tried to
7 detain him. (UF 14; Exhibit 1.)

8 On April 29, 2009, Plaintiff plead guilty to violating Count II of the
9 complaint – California Penal Code § 148(a)(1), and Count III—California Health
10 and Safety Code § 11550(a). (UF 15; Exhibits 2 and 3.) Plaintiff signed a four-
11 page document entitled "Misdemeanor Advisement of Rights, Waiver, and Plea
12 Form," which freely acknowledges the guilty plea. (UF 16; Exhibit 2.) Plaintiff's
13 plea was approved by the Court. (UF 17; Exhibits 2 and 3.) In open court on April
14 29, 2009, in the presence of his criminal defense counsel, Plaintiff admitted he
15 understood the charges against him, and pled guilty. (UF 18; Exhibit 3.)

16 **II. PARTIES AND CLAIMS FOR RELIEF.**

17 Plaintiff in this action is Preston Smith. Defendants in this action are the
18 City of Burbank, the Burbank Police Department, Officer Baumgarten, Officer
19 Edwards, and Officer Gunn.

20 Plaintiff's Complaint contains four claims for relief – (1) a violation of his
21 Fourth Amendment rights pursuant to 42 U.S.C. § 1983, (2) California Civil Code
22 § 52.1, (3) intentional infliction of emotional distress, and (4) assault and battery.

23 **IV. STANDARD FOR MOTION FOR SUMMARY JUDGMENT.**

24 Summary judgment must be rendered when there is no genuine issue as to
25 any material fact and the moving party is entitled to judgment as a matter of law.
26 Federal Rules of Civil Procedure, Rule 56 (c); *British Airways Board v. Boeing*
27 *Co.*, 585 F.2d 946, 951 (9th Cir. 1978). Further, if summary judgment is not
28 granted on the entire action, a court may render partial summary judgment on
individual issues as to which there remains no genuine issue of material fact.

1 Federal Rules of Civil Procedure, Rule 56 (b), (d). "If the evidence is merely
2 colorable, or is **not significantly probative**, summary judgment may be granted."
3 *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-250, 106 S. Ct. 2505 (1986)
4 (emphasis added).

5 **V. PLAINTIFF'S SECTION 1983 CLAIMS ARE BARRED BY HIS**
6 **CONVICTION FOR VIOLATING PENAL CODE § 148.**

7 Plaintiff's Section 1983 claim against Officers Baumgarten and Edwards are
8 barred by the long-standing doctrine that a civil rights plaintiff cannot pursue a
9 claim that could call into question his criminal conviction. In *Heck v. Humphrey*,
10 *supra*, the Supreme Court held that:

11 "[I]n order to recover damages for allegedly unconstitutional
12 conviction or imprisonment, or for other harm caused by actions
13 whose unlawfulness would render a conviction or sentence invalid,
14 a § 1983 plaintiff must prove that the conviction or sentence has
15 been reversed on direct appeal, expunged by executive order,
16 declared invalid by a state tribunal authorized to make such
17 determination, or called into question by a federal court's issuance
18 of a writ of habeas corpus.... A claim for damages bearing that
19 relationship to a conviction or sentence that has not been so
20 invalidated is *not* cognizable under § 1983. Thus, when a state
21 prisoner seeks damages in a § 1983 suit, the district court must
22 consider whether a judgment in favor of the plaintiff would
23 necessarily imply the invalidity of his conviction or sentence; if it
24 would, the complaint must be dismissed...."

25 *Heck*, 512 U.S. at 486-87.

26 According to *Heck*, "[I]f a criminal conviction arising out of the same facts
27 stands and is fundamentally inconsistent with the unlawful behavior for which
28 section 1983 damages are sought, the 1983 action must be dismissed." *Smith v.*
Hemet, 394 F. 3d 689, 695 (2005); *Smithart v. Towery*, 79 F. 3d 951, 952 (9th Cir.

1 1996). "As the Supreme Court explained, the relevant question is whether success
2 in a subsequent § 1983 action would 'necessarily imply' or 'demonstrate' the
3 invalidity of the earlier conviction or sentence under § 148(a)(1)." *Smith*, 394 F.
4 3d at 695, citing *Heck*, 512 U.S. at 487.

5 If Plaintiff were to prevail on his Section 1983 claim, such a finding would
6 necessarily imply the invalidity of his conviction for violating Penal Code §
7 148(a)(1). The legal elements for a violation of Penal Code § 148(a)(1) are "(1)
8 the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when
9 the officer was engaged in the performance of his or her duties, and (3) the
10 defendant knew or reasonably should have known that the other person was a
11 peace officer engaged in the performance of his or her duties." *Smith*, 394 F. 3d at
12 695; *In re Muhammed C.*, 95 Cal. App. 4th 1325, 1329 (2002).

13 For a Penal Code § 148(a)(1) conviction to be valid, the criminal defendant
14 must resist, delay, or obstruct the officer in the **lawful** exercise of his duties.
15 *Smith*, 394 F. 3d at 695. The lawfulness of the officer's conduct is an essential
16 element of the crime. *See People v. Curtis*, 70 Cal. 2d 347, 354-56 (1969); *Susag*
17 *v. City of Lake Forest*, 94 Cal. App. 4th 1401, 1409 (2002). Therefore, if the
18 officer was not performing his or her duties at the time of the arrest, the arrest is
19 unlawful and the arrestee cannot be convicted under Penal Code § 148(a)(1).
20 *Smith*, 394 F. 3d at 695.

21 Plaintiff's allegation that Officers Baumgarten and Edwards used excessive
22 force against him is inconsistent with Plaintiff's conviction, because a police
23 officer's excessive force is an affirmative defense to a Penal Code § 148(a)(1)
24 charge. "Excessive force used by a police officer at the time of the arrest is not
25 within the performance of the officer's duty." *Smith*, 394 F. 3d at 695 (emphasis in
26 original), citing *People v. Olguin*, 119 Cal. App. 3d 39, 45-46 (1981). If Officers
27 Baumgarten and Edwards used excessive force against Plaintiff, then Plaintiff
28 could not have been convicted of violating California Penal Code § 148(a)(1).
Because Plaintiff pled guilty to the violation, a finding in his favor on his Section

1 1983 claim against Officers Baumgarten and Edwards would be inconsistent and
2 necessarily invalidate his conviction.

3 Federal district courts have held that *Heck v. Humphrey* bars a plaintiff's
4 Section 1983 action for excessive force absent proof that a conviction under Penal
5 Code § 148(a) has been invalidated by appeal or other proceeding. *Franklin v.*
6 *County of Riverside*, 971 F. Supp. 1332, 1336 (C.D.Cal. 1997); *Nuno v. County of*
7 *San Bernardino*, 58 F. Supp. 2d 1127, 1133-1134 (C.D.Cal. 1999). Because
8 Plaintiff's conviction has not been invalidated, his Section 1983 claim against
9 Officers Baumgarten and Edwards should be dismissed.

10 Although the Ninth Circuit and the California Supreme Court have identified
11 factual scenarios in which a Penal Code § 148(a)(1) conviction would not be
12 inconsistent with a finding that a police used excessive force, those factual
13 scenarios are not present here. *Smith*, 394 F.3d at 696; *Yount v. City of*
14 *Sacramento*, 43 Cal.4th 885, 899 (2008). For example, in *Smith*, the plaintiff
15 alleged that the officers used excessive force during multiple interactions with him,
16 but the criminal record was inconclusive as to what conduct was the basis for the
17 criminal conviction. Without a better explanation for why the plaintiff was
18 convicted, the Ninth Circuit found that the plaintiff could have been convicted for
19 conduct during the first encounter and still proven excessive force during a later
20 encounter without disturbing the conviction. *Id.*

21 In this action, the criminal record prevents Plaintiff from making the same
22 argument. The criminal record demonstrates that Plaintiff violated Penal Code §
23 148(a)(1) during the entire period of time that he interacted with Officers
24 Baumgarten and Edwards. Neither Plaintiff nor his criminal counsel limited the
25 scope of the factual basis for Plaintiff's guilty plea. The criminal record, therefore,
precludes a finding that Officer Gunn used excessive force.

26 Furthermore, to the extent that Plaintiff's Section 1983 claim is based on a
27 false arrest allegation, this claim also fails. Plaintiff's guilty plea should make it
28 readily apparent that probable cause existed for his arrest. *See* Fed.R.Civ.P. Rule

1 11. Not only did Plaintiff plead guilty to violating Penal Code § 148(a)(1), he also
2 plead guilty to being under the influence of cocaine – Health and Safety Code §
3 11550(a).

4 **VI. PLAINTIFF'S STATE LAW CLAIMS ARE ALSO BARRED BY HIS**
5 **CONVICTION FOR VIOLATING CALIFORNIA PENAL CODE §**
6 **148(a)(1).**

7 The California Supreme Court has applied the *Heck* principle to claims
8 brought under California law. *Yount v. City of Sacramento*, 43 Cal. 4th 885, 902
9 (2008). "[W]e cannot think of a reason to distinguish between section 1983 and a
10 state tort claim arising from the same alleged misconduct..." *Id.* Therefore,
11 Plaintiff's state law claims for California Civil Code § 52.1, intentional infliction of
12 emotional distress, and assault and battery should be dismissed as well.

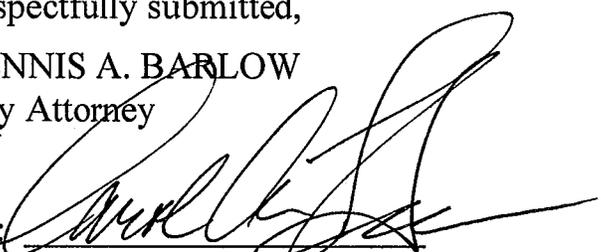
13 **VII. CONCLUSION**

14 For the foregoing reasons, Officers Baumgarten and Edwards request that
15 the Court dismiss all claims against them.

16 DATED: April 18, 2011

17 Respectfully submitted,

18 DENNIS A. BARLOW
19 City Attorney

20 By: 

21 CAROL A. HUMISTON
22 Sr. Assistant City Attorney
23 Attorney for Defendants CITY OF
24 BURBANK BURBANK POLICE
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